6 small issues with real estate documents that can turn into big problems

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Musician Don Henley famously sang, "Lawyers dwell on small details."

He was certainly right if he was singing about lawyers who handle real estate and business transactions. However, he should have added a line about how those details matter. Following are six seemingly unimportant issues that can arise in real estate documents and business contracts that can turn into big problems, and tips on how to avoid them. In other words: DO sweat the small stuff.

Provisions concerning the giving of written notice

Provisions that concern the giving of written notice is the first thing a litigator will look at to try to negate the exercise of a party's rights under a contract. Was the notice given in the proper way? Were all necessary parties notified? What is the date upon which the notice was "given"? Many cases have been won or lost on these small points.

Make sure you have a street address for delivery. Overnight commercial couriers like Federal Express or UPS cannot deliver to a P.O. Box. If that is the only address provided for a party, that effectively negates the most effective way to give written notice.

Virtually all important deadlines start when the written notice is "given," so the notice provision should leave no doubt as to the date upon which the notice will be considered "given." Many older notice provisions say that the notice is considered "given" when it is sent. That is an invitation for litigation later.

The better practice is to make notices effective when delivered, and also to provide for measures to cover the possibility of the recipient dodging the notice. First, provide that notices may be sent by overnight commercial courier service, but only if that courier service has the capacity to document attempted deliveries. This would include Federal Express or UPS or U.S. Postal Service Priority Mail. Then, add that delivery will be deemed to have occurred if delivery is refused or otherwise is unsuccessful during business hours on a business day.

Does your outdated notice provision allow for notice by regular mail? Regular mail can take forever, has no proof of dispatch, and may never get delivered. That should be removed from the notice provision. The same can be said for certified mail. It too can take forever for delivery. Federal Express or UPS or U.S. Postal Service Priority Mail are far better alternatives.

I have seen many notice provisions that state that notice will be considered "given" two days after deposit in regular mail or certified mail, which just means that a time period can be running against a party many days before the notice actually arrives.

Pay close attention to the method of sending written notice and ensure that the notice is sent to all of the parties who must receive the written notice or copies of it. Any important written communication under a contract should be sent exactly as the notice provision specifies. If it requires certified mail or overnight courier service, then email will not be sufficient. If it requires that the notice be sent to two addresses, with a copy to a lender or an attorney, make sure that the notice is sent to all of the named persons.

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Remember to check not only the provision about written notice, but also provisions relating to encumbrances and mortgages. Sometimes a provision requiring written notice to a party's lender can be found only in those provisions.

Property description; survey vs. written document

The property itself is the reason for the real estate transaction, so it is worth the extra effort to make sure the description of the property is accurate and consistent.

The first thing to do is to make sure the survey matches the written property description. Different states have different rules as to whether the property description or the survey will control, in case of a discrepancy. In Louisiana, for instance, the survey will control, if it is both specifically referred to in the written document and either attached to the written document or independently recorded. Regardless of the result in any particular state, a discrepancy between the property description and the survey can create problems, so the two of them should be reviewed carefully for accuracy and consistency.

In a sale or donation, of course, a full legal description will be used. But sometimes attorneys cut corners on ancillary documents, such as a Memorandum of Lease, and just provide a municipal address (for example, 123 Main Street, Any Town, My State). In some states a mere municipal address is not sufficient to place parties on notice of the property that is subject to the lease.

Recordation

In states where recordation of a lease or document is designed to give notice to third parties, there are several pitfalls to be avoided.

If a lease contains options to renew, it is important to make sure that the recorded Memorandum of Lease places third parties on notice that the lease may still be in existence during the renewal terms. Achieving that result will vary according to state law and should be checked carefully.

Is it sufficient under state law if the Memorandum of Lease refers to the options to renew and specifically identifies the dates of all of the renewal terms? Or, under state law, must a separate Memorandum of Lease be recorded each time that a renewal right is actually exercised?

Easements or servitudes usually create relationships between two parcels of property. In states where recordation of a document is searched on a parcel by parcel basis, recordation must be achieved under all of the parcels that are subject to the easement or servitude. This is to ensure that third parties searching the public records will find the easement or servitude through a search of any of the affected parcels.

Sometimes a lease places restrictions or burdens on parcels of property other than the specific leased premises. For instance, a landlord may be restricted from allowing particular uses on other nearby parcels that the landlord owns, or a tenant may be granted parking rights on other parcels that the landlord owns.

Reference to such obligations in the Memorandum of Lease itself will not be discovered when a title examiner reviews title to the leased premises. Therefore, one must be careful to record the restrictions or rights in a document that specifically refers to and describes the parcel of property that is burdened, so that a purchaser of that property will be on notice of the obligations to which that parcel is subject.

Assignment of a contract

In most if not all states, assignment of a contract does not relieve the original party from its obligations. If a tenant is assigning its lease, for example, it should secure a specific release from the landlord with respect to all future obligations under this lease in order to be assured that the sins of the assignee tenant won't find their way back to the original (assignor) tenant.

Force majeure

Much has been written about force majeure in recent years. Because of recent climate issues, most attorneys make sure that their contracts do contain force majeure clauses.

Depending upon which side of the transaction you are on, however, there is one critical sentence to be considered. Do you want to add a sentence providing that relief under the force majeure clause does *not* apply to monetary obligations, such as the payment of rent?

Insurance

Much has been written about insurance, and it is a complex subject deserving articles devoted solely to it. Here are some smaller, sometimes overlooked, things to consider about insurance provisions in a lease.

Does your lease clearly delineate who is responsible to carry business interruption/loss of rents insurance? It generally needs to be aligned with the property/casualty insurance. In other words, the party who is obligated to carry the property/casualty insurance should generally also be the party required to carry loss of rents/business interruption insurance.

Remember to consider flood insurance. Merely requiring property/casualty insurance, even "all risk" and "extended" coverage, will not include flood insurance. If flood insurance is to be required, it must be specifically described.

The devil is in the details

Sometimes, the devil really is in the details. Or, more accurately, if the small items discussed above are not carefully considered and addressed, the devil will be able to exploit these seemingly small details and turn them into much bigger headaches. And if Don Henley were the client whose lawyer paid attention to these small details, he would sing a song of thanks.

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About the author

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